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December 8, 1997

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Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Teligent, Inc.  
Docket No. ET 97-99  
Notice of Ex Parte Presentation

Dear Ms. Salas:

Pursuant to Section 1.206(a)(2) of the Commission's rules, Teligent, Inc. ("Teligent") hereby submits this notice of an ex parte presentation. On December 4, 1997, representatives of Teligent met with Karen Gulick, Legal Advisor to Commissioner Tristani, to discuss the issues raised in the above-referenced proceeding. Specifically, Teligent stated, consistent with its filings in this proceeding, its position that there is no merit to the assertions raised in the petitions for reconsideration. Ms. Gulick was provided a copy of the enclosed document in the meeting. Teligent was represented by Laurence E. Harris and David Turetsky of Teligent, and Antoinette Cook Bush and Jay Birnbaum of Skadden, Arps, Slate, Meagher & Flom LLP.

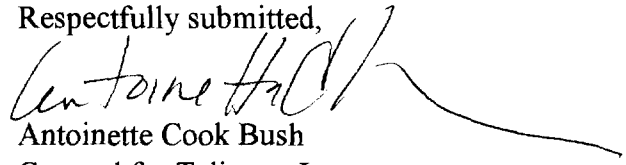
Copies of this Notice of Ex Parte Presentation have been provided to the above-referenced Commission representatives, as required by Section

021

Magalie Roman Salas  
December 8, 1997  
Page 2

1.1206(b)(2) of the Commission's rules. An original and one copy has been submitted to the Secretary's office.

Respectfully submitted,



Antoinette Cook Bush  
Counsel for Teligent, Inc.

Enclosure

cc: Karen Gulick  
Laurence Harris  
David Turetsky

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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SEP 16 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

174 Applications of Microwave Services, Inc. )  
for New Nodal Stations in the Digital )  
Electronic Message Service )

File No. 9607682 *et al.*  
(Lead Application)

To: Chief, Wireless Telecommunications Bureau )

**JOINT OPPOSITION TO CONSOLIDATED PETITION TO DENY  
AND PETITION TO DETERMINE STATUS OF LICENSES**

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Dated: September 16, 1996

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## SUMMARY

The Telecommunications Act of 1996 ("1996 Act") was enacted to free the local telecommunications marketplace from monopoly and encourage local competition for the benefit of consumers. One legislative intent of the 1996 Act was that entrepreneurial efforts in this new market would flourish and foster new ideas, new technologies and new entrants. Microwave Services, Inc. ("MSI") and Digital Services Corporation ("DSC"), two such entrepreneurs, are in the process of deploying broadband facilities-based wireless local telecommunications network using frequencies in the 18 GHz digital electronic message service ("DEMS") band.

In its Consolidated Petition to Deny and Petition to Determine Status of Licenses ("Petition"), Teledesic Corporation ("Teledesic"), continues its anticompetitive and disparaging attack on 18 GHz DEMS licensees, including a challenge of MSI's and DSC's existing DEMS licenses, as part of a transparent effort to gain political leverage in its attempt to appropriate a full 1 GHz of spectrum for Teledesic's exclusive use. In this pursuit, Teledesic seeks to prevent MSI and DSC from competing in the local exchange marketplace, contrary to clear principles of public interest and the express mandate of the Telecommunications Act of 1996.

In support of its challenge, Teledesic introduces an "interference analysis" dated August 30, 1996. This analysis purports to demonstrate that Teledesic's proposed NGSO/FSS system (although not necessarily other NGSO/FSS systems) would receive unacceptable interference from 18 GHz DEMS operations. However, the analysis employs substantially different technical criteria from that set forth in Teledesic's satellite system application and directly contradicts representations made by Teledesic over the last 2½ years to the Commission and the international community regarding its proposed system's compatibility with 18 GHz terrestrial microwave operations. In fact, *on the same date* it purportedly authored this interference analysis, Teledesic authored a separate document to the U.S. World Radiocommunication Council delegation claiming that "[f]requency sharing between satellites of a NGSO FSS network and FS stations appears to be feasible." Teledesic's "latest" analysis is nothing more than an attempt by Teledesic to create the perception of incompatibility between its proposed system and DEMS systems in an effort to deter competition and ultimately to obtain the 18 GHz band for its sole use.

Teledesic seeks from the Commission totally unprecedented actions, contrary to the Commission's rules and explicit public policy. In particular,

- Teledesic requests that the Commission deny the 174 DEMS applications of MSI, despite the fact that such applications relate only to the build-out of 7 of its already licensed markets as specifically authorized by the Commission in its recent order freezing additional applications in the 18 GHz band, and despite the fact that such applications were made on the basis of Teledesic's previously published interference studies, which it now contradicts.
- Teledesic seeks reconsideration of the grant of multiple channels granted to MSI between seven and 18 months ago, despite the fact that MSI previously applied, and was granted a waiver, for multiple channels pursuant to the Commission's public application and hearing process in which Teledesic affirmatively chose not to participate.
- Without a shred of credible evidence, Teledesic requests a determination of whether the licenses of MSI's and DSC's DEMS stations have automatically lapsed, despite the fact that (i) Associated and DSC have completed construction of such stations in compliance with the Commission's rules and are currently serving customers and (ii) Teledesic offers no facts, and even fails to allege facts, in support of its claims.
- Teledesic requests that the Commission issue an interim order preventing further expansion by existing DEMS licensees of their systems, despite the fact that the Commission has expressly authorized the expansion of DEMS systems by existing licensees in its recent order instituting a freeze on additional applications for 18 GHz licenses.

Accordingly, the Commission should promptly grant MSI's 174 applications for additional nodal stations and dismiss or deny Teledesic's Petition, including its baseless request for investigations of MSI's and DSC's systems.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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174 Applications of Microwave Services, Inc.	)	File No. 9607682 <i>et al.</i>
for New Nodal Stations in the Digital	)	(Lead Application)
Electronic Message Service	)	
	)	
To: <i>Chief, Wireless Telecommunications Bureau</i>	)	
<hr/>	)	

**JOINT OPPOSITION TO CONSOLIDATED PETITION TO DENY  
AND PETITION TO DETERMINE STATUS OF LICENSES**

Microwave Services, Inc. ("MSI") and Digital Services Corporation ("DSC"), by their attorneys, hereby jointly oppose the Consolidated Petition to Deny and Petition to Determine Status of Licenses filed by Teledesic Corporation ("Teledesic") on September 6, 1996 ("Petition").

In its Petition, Teledesic requests that the Commission take several unwarranted and extraordinary actions. First, it requests that the Commission deny 174 pending applications for additional Digital Electronic Message Service ("DEMS") nodal stations in markets previously licensed to MSI. Teledesic claims, without any meaningful technical showing, that such nodal stations would interfere with its still unlicensed non-geostationary fixed satellite service

("NGSO/FSS") system.<sup>1</sup> Second, Teledesic asks the Commission to modify or "rescind" MSI's DEMS licenses, claiming only that the licenses were "improvidently" granted. This request, however, comes at least one year, and for several of the licenses *almost two years*, after the time for opposing the relevant applications expired, and between *seven and 18 months* after the licenses were issued. Finally, without any supportable factual or legal basis, Teledesic asks the Commission to investigate and freeze the build-out of MSI's and DSC's licensed DEMS systems.

#### **I. Introduction**

The Petition is a flawed and untimely attempt by Teledesic to obtain a *de facto* re-designation of the 18 GHz band for its exclusive use, notwithstanding the recent designation of the band -- at Teledesic's urging -- for use by NGSO/FSS, knowing full well of the band's co-primary status with the fixed service ("FS"). Indeed, Teledesic makes this attempt little more than a month *after* the Commission granted Teledesic's request for designation of the 18

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<sup>1</sup> See Application of Teledesic Corporation for a Low Earth Orbit Satellite System in the Fixed Satellite Service, File No. 22-DSS-P/LA-94 (filed March 24, 1994); Amendment, File No. 43-SAT-AMEND-95 (filed April 19, 1994); Amendment, File No. (filed Dec. 30, 1994); Erratum (filed July 18, 1995).



GHz band for NGSO/FSS downlink operations.<sup>2</sup> For the past two years, Teledesic has engaged in a sustained and successful effort to convince the Commission and the international community that its proposed satellite system could and would coexist with existing terrestrial microwave networks in the 18 GHz band. Teledesic now contradicts its repeated representations since it is faced with the specter of a dynamic new competitor that can capture market share long before it even launches its first satellite. Teledesic claims that its proposed NGSO/FSS system cannot co-exist with licensed DEMS systems operating in the 18 GHz band. Teledesic's attempt to manipulate the Commission's processes for its exclusive benefit directly contravenes Section 7(a) of the Communications Act.<sup>3</sup>

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<sup>2</sup> See Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *First Report and Order and Fourth Notice of Proposed Rulemaking*, CC Dkt. No. 92-297, FCC 96-311 (Released Jul. 22, 1996) ("28 GHz Order").

<sup>3</sup> 47 U.S.C. § 157(a). If, as Teledesic now claims, its proposed NGSO/FSS system is not compatible with 18 GHz FS systems, then the Commission should deny Teledesic's application pending a demonstration by Teledesic that its system can be coordinated with 18 GHz FS users, and if such demonstration cannot be made, the Commission should deny Teledesic's application. MSI and DSC are filing simultaneously herewith a Petition to Deny Teledesic's NGSO/FSS application based on Teledesic's new claim of incompatibility with FS microwave systems.

Teledesic's sudden attacks on DEMS licensees appears predicated on its realization that DEMS operators are formidable competitors. MSI and DSC are building DEMS systems to provide facilities-based competitive services in the local exchange marketplace, as envisioned by the Telecommunications Act of 1996 ("1996 Act"). These advanced, cost-effective DEMS systems will be capable of providing a full array of broadband services to small and medium-sized businesses, hospitals, schools and residential customers.<sup>4</sup> Yet, whereas MSI's and DSC's initial systems are already operational and more advanced systems will be deployed over the next few years, Teledesic plans to deploy its initial system in 2001, at the earliest.

The instant Petition is just another maneuver in Teledesic's two-year old strategy to seize an entire 1 GHz for its exclusive use on a global basis. Indeed, now that it has successfully cleared local multipoint distribution service ("LMDS") users, other satellite systems, and point-to-point microwave licensees out of its designated 28 GHz uplink band, it is now attempting to clear its

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<sup>4</sup> Indeed, in Denver DSC is already providing service to an emergency 911 police response unit. President Clinton recently confirmed the value of DEMS systems by proposing an auction of 18 GHz spectrum as a method of raising \$500 million for various federal initiatives. "Clinton Details Funding for His Initiatives," *The Washington Post*, August 28, 1996, at A2.

designated 18 GHz downlink band in a similar fashion.<sup>5</sup> Contrary to such earlier spectrum battles, the instant terrestrial and satellite systems are not mutually exclusive. Teledesic's latest claims of incomparability notwithstanding, common carrier DEMS spectrum is co-primary with only 100 MHz of NGSO/FSS's 500 MHz downlink designation in the U.S. Further, as Teledesic argued as recently as August 30, 1996 -- the same day it completed its interference analysis on which its Petition is based -- NGSO/FSS and 18 GHz FS licensees can coexist.

## **II. Background**

MSI and DSC collectively hold licenses to construct and operate DEMS systems in 31 Standard Metropolitan Statistical Areas ("SMSAs"). DSC filed applications to construct and operate DEMS systems in 26 SMSAs, which appeared on Public Notice in October and December 1993.<sup>6</sup> Similarly, MSI filed applications to construct and operate DEMS systems in nine SMSAs in December 1993, and these applications appeared on Public Notice in November

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<sup>5</sup> Teledesic also requested a freeze on the processing of new DEMS applications as part of its coordinated effort to undermine the construction and operation of DEMS systems. *See* Letter dated August 23, 1996 from Scott Blake Harris to Michele Farquhar, Chief, Wireless Telecommunication Bureau.

<sup>6</sup> *See* Public Notice Report No. 1052 (Released Oct. 13, 1993); Public Notice Report No. 1060 (Released Dec. 8, 1993); Public Notice Report No. 1061 (Released Dec. 15, 1993).

1994.<sup>7</sup> MSI also filed two additional applications for the Los Angeles and San Francisco SMSAs in April 1994, which appeared on public notice that same month.<sup>8</sup> Finally, between April 1994 and August 1995, MSI filed applications to construct and operate DEMS systems in 19 additional SMSAs.<sup>9</sup>

The Commission granted 25 of the 26 DSC applications<sup>10</sup> and two of the MSI applications (for the San Francisco and Los Angeles SMSAs) in January 1995.<sup>11</sup> Initial construction of the MSI systems in the Los Angeles and San Francisco SMSAs, as well as the 25 DSC systems licensed in January 1995, was timely completed and commercial service to subscribers has commenced.<sup>12</sup> These licenses authorize MSI and DSC to operate on a single DEMS channel in each SMSA. MSI's remaining licenses, which were issued in May 1995 and January and February 1996, authorize MSI to operate on three or four DEMS

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<sup>7</sup> See Public Notice Report No. 1110 (Released Nov. 23, 1994).

<sup>8</sup> See Public Notice Report No. 1080 (Released Apr. 28, 1994).

<sup>9</sup> See Public Notice Report No. 1080 (Released Apr. 28, 1994); Public Notice Report No. 1150 (Released Aug. 30, 1995).

<sup>10</sup> See Public Notice Report No. 1118 (Released January 18, 1995). Due to Canadian coordination issues, the last DSC application, for the Detroit SMSA, was granted a year later. See Public Notice Report No. 113 (Released February 7, 1996).

<sup>11</sup> See Public Notice Report No. 1118 (Released Jan. 18, 1995).

<sup>12</sup> See Attachment 1, Declarations of Richard I. Goldstein and Roy J. Mehta.

channels in an additional 25 SMSAs.<sup>13</sup> MSI is in the process of constructing the initial facilities of these systems for which the respective initial construction deadlines are November 1996 and July and August 1997 and DSC is in the process of constructing its Detroit system, which also has a July 1997 construction deadline.<sup>14</sup> Moreover, pursuant to its rights as a DEMS licensee, MSI filed the above-captioned 174 applications for additional nodal stations in seven of its 27 SMSAs to continue the build-out of its networks throughout these markets.<sup>15</sup>

In their applications, DSC and MSI proposed to construct "cellular-like" DEMS systems eventually using equipment that at the time was still in development. For example, DSC stated in its application that it would "utilize currently available and type accepted microwave transmitters" (*i.e.*, point-to-point equipment), and that it also was "working closely with an equipment manufacturer to develop 18 GHz radio equipment which better provides for the specific

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<sup>13</sup> See Public Notice Report No. 1136 (Released May 24, 1995); Public Notice Report No. 1172 (Released Jan. 31, 1996).; Public Notice Report No. 1173 (Released Feb. 7, 1996).

<sup>14</sup> Three of MSI's applications have not been granted. One, for the Denver SMSA, was dismissed due to coordination issues involving 18 GHz U.S. government facilities. See 47 C.F.R. § 2.106 n.US334. Two other applications, for the New York and Boston SMSAs, remain pending. Attachment 2 is a timeline showing the dates of the filing and grant of applications for current DEMS licenses, the filing of Teledesic's application, and the proposal and designation of the 18 GHz allocation for NGSO/FSS.

<sup>15</sup> See Public Notice Report No. 1199 (Released Aug. 7, 1996).

requirements of this unique application."<sup>16</sup> Similarly, MSI also explained in its application that it was seeking to develop a highly efficient multipoint system that would require significant investment, research and development.<sup>17</sup> These collective efforts are still underway.

DEMS, like most technologies, has evolved over time. MSI and DSC have faced many challenges and have worked closely with the Commission's staff to apprise it of their plans and the needs. Accordingly, MSI and DSC sought and received Commission waivers of certain technical and related rules central to their efforts to build out their systems in competition with incumbent local exchange carriers and other landline and wireless-based operators that do not need prior approval for the addition of new facilities. For example, most of MSI's and all of DSC's license grants included a waiver of Section 21.3(b)'s requirement that each DEMS nodal station be individually licensed and receive prior Commission approval before being constructed.<sup>18</sup>

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<sup>16</sup> See, e.g., DSC Application for Pittsburgh SMSA, FCC File No. 9307022, Exhibit K, at 1.

<sup>17</sup> See, e.g., MSI Application for Pittsburgh SMSA, FCC File No. 9508802, Exhibit K, at 1; Exhibit M, at 4.

<sup>18</sup> See 47 C.F.R. § 21.3(b), now codified at 47 C.F.R. § 101.5(b). MSI received its waiver for all but the seven of its licensed SMSAs to which the 174 above-captioned applications pertain. These seven SMSAs are Chicago, Philadelphia, Dallas, Houston, Washington, D.C., Atlanta and Miami.

Further, in its applications and pre-filing discussions with the Commission's staff, MSI explicitly demonstrated grounds for licensing of multiple channels under then Section 21.502(b) or, alternatively, for a waiver of Section 21.502(b).<sup>19</sup> MSI successfully demonstrated that in order to develop and market its services and to develop and deploy equipment in a cost-effective manner, it required multiple channels in the larger SMSAs. In issuing MSI its licenses, therefore, the Commission granted MSI the authority exclusively to operate on three or four common carrier DEMS channels in 25 SMSAs.

Throughout 1995 and the first half of 1996, MSI and DSC -- first independently and later in a cooperative effort -- proceeded to construct their respective licensed facilities. While obviously aware of Teledesic's 1994 application, MSI and DSC took Teledesic at its word when the NGSO/FSS applicant repeatedly asserted that its system could coexist with their DEMS systems.<sup>20</sup> Thus, when the Commission staff suggested to MSI and DSC that they contact

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<sup>19</sup> See 47 C.F.R. § 21.502(b), now codified at 47 C.F.R. § 101.505(b).

<sup>20</sup> Not only did Teledesic have at least constructive notice (via the public notice process) of 18 GHz DEMS systems when it filed its application in 1994, it demonstrated its actual knowledge of the existence of such DEMS systems as early as June 1995. Specifically, Teledesic performed a preliminary interference analysis between its proposed downlinks and DSC's DEMS systems and corresponded with DSC. See Attachment 3, Letter dated June 20, 1995 from Russ Daggart, Teledesic Corporation to Dr. Raj Singh, Digital Services Corporation and Letter dated December 8, 1995 from Farzad Ghazvinian to Dr. Raj Singh, Jaemin Bark, and Pamela C. Bjornson.

Teledesic to discuss future coordination issues, the DEMS licensees proceeded to do so, inviting Teledesic to a meeting held in late July 1996 at the offices of MSI's counsel. At this meeting, the parties agreed to begin exchanging basic technical information in preparation for a serious coordination effort, and a preliminary information exchange took place during mid-August 1996. Under the circumstances, DSC and MSI were shocked when on August 23, 1996 Teledesic suddenly filed a request for a freeze on future DEMS licensing activity, alleging that the deployment of additional DEMS stations was *per se* incompatible with its proposed NGSO/FSS system.

On August 30, 1996, the Commission implemented a freeze on additional applications for DEMS stations, but specifically exempted from the freeze MSI's pending applications for 174 additional nodal stations to build out its licensed SMSAs.<sup>21</sup> Rather than effectively participating in the coordination discussions proposed by the Commission staff, Teledesic has chosen to continue pursue its newly adopted litigation strategy of attacking MSI's and DSC's pending

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<sup>21</sup> See Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band, *Order*, DA 96-1481 (Released Aug. 30, 1996) at ¶¶ 6-7 ("*Freeze Order*").



applications and existing 18 GHz DEMS licenses, first by requesting a freeze on new DEMS applications and now in the instant Petition.<sup>22</sup>

## II. Argument

### A. The Pending 174 Applications for MSI to Build Out Seven of its Previously Licensed DEMS Systems Should be Promptly Granted

Teledesic raises three basic arguments in opposing the grant of the 174 above-captioned MSI applications to build out its DEMS systems in seven SMSAs. First, Teledesic concocts a theory that the Commission "improvidently" (*i.e.*, without foresight) authorized MSI to operate multiple channels in these and other SMSAs. Teledesic contends that, because this initial grant is somehow infirm, the applications to build out additional nodal stations must also be cast aside. Second, it contends that the recent *Freeze Order* bars the processing of the 174 additional nodal station applications. Finally, it claims that the proposed nodal stations would "cause harmful interference" to NGSO/FSS earth stations. Each of these assertions is legally and factually flawed and nothing but an ill-disguised attempt to begin clearing the 18 GHz band exclusively for Teledesic's proposed NGSO/FSS satellite system.

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<sup>22</sup> Oddly, Teledesic fails to attack other DEMS licenses or point-to-point licensees in the 18 GHz band. Any coordination issues would be the same for all incumbent licensees in the band.

1. The Petition is Procedurally Defective and Must Be Dis-  
missed.

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The Petition has several fatal procedural flaws. First, Teledesic lacks standing to challenge MSI's 174 applications for additional nodal stations and MSI's and DSC's existing DEMS licenses. To establish standing, a petitioner must demonstrate that it would suffer "injury in fact" from the action it challenges and that it is within the "zone of interests" entitled to protection.<sup>23</sup> In connection with DEMS applications, including applications for additional nodal stations in previously licensed SMSAs, only licensees or applicants for DEMS or specific satellite earth station facilities are entitled to prior frequency coordination or interference protection.<sup>24</sup> Thus, the Commission's rules expressly establish the zone of interests protected from such applications and in doing so has set the threshold for establishing standing to challenge them. Teledesic, which has filed only a space station application, lacks sufficient "injury in fact" to attain standing

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<sup>23</sup> See *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *United States v. SCRAP*, 412 U.S. 669 (1973); *Committee for Effective Cellular Rules v. FCC*, 77 RR 2d (P&F) 1263 (D.C. Cir. 1995); *General Telephone Co. of California*, 3 FCC Rcd 2317 (1988).

<sup>24</sup> See 47 C.F.R. §§ 25.251, 101.21(f), 101.103(d) (clearly stating that only licensees or applicants for specific earth station or FS facilities within certain distances have standing to oppose DEMS applications for additional nodal stations in already licensed SMSAs).

to challenge MSI's applications for additional nodal stations and clearly is outside the "zone of interests" entitled to protection.<sup>25</sup>

Second, Teledesic's request to "rescind" MSI's previously issued licenses essentially is an untimely petition for reconsideration. Neither the Communications Act nor the Commission's rules contemplate rescission of licenses issued by final grant. As described in greater detail below, the Commission's multiple-channel license grants to MSI were fully authorized by and consistent with the Commission's rules and procedures.<sup>26</sup> These license grants have long become final orders and no longer are subject to administrative review. Perhaps recognizing the futility of its arguments, Teledesic attempts to create a new type

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<sup>25</sup> Contrary to Teledesic's broad claim of standing "as an interested member of the public," neither Congress nor the Commission allows "citizen standing" whereby any person may petition to deny any application. See *Lawrence N. Brandt*, 64 R.R.2d 1771 (1988); see also *Allen v. Wright*, 468 U.S. 737, 754 (1984); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 (1974). Indeed, the cases cited by Teledesic to support its claim of standing are inapposite. Petition at 1 n.1. The first two cases are limited to the broadcast area and hold that specific allegations of economic injury afford an *existing broadcast licensee* standing to challenge an application for a new license in the same geographic area. See *FCC v. Sanders*, 309 U.S. 470 (1940); *Camden Radio, Inc. v. FCC*, 220 F.2d 191 (D.C. Cir. 1954). The other case cited by Teledesic, *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995), is also off the point. It simply reflects long-standing Commission law, again limited to the broadcast area, that members of a broadcast station's listening public (or an organization representing such listeners) have standing to challenge the station's license renewal application. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966).

<sup>26</sup> See *infra* pp.16-19.

of relief, but its challenge constitutes nothing more than a late-filed petition for reconsideration. Section 405 of the Communications Act as well as applicable Commission rules require that petitions for reconsideration must be filed within 30 days of the requisite Commission action.<sup>27</sup> Since MSI's licenses were granted between January 1995 and February 1996, the time for Teledesic to seek reconsideration of the grants has long since passed. It is well-established that licenses issued by final orders are not subject to challenge since allowing post-finality challenges to license grants would undermine the certainty of Commission actions and subject licensees to harassment by insincere challengers.<sup>28</sup>

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<sup>27</sup> See 47 U.S.C. § 405(a); see also 47 C.F.R. § 101.43(a)(4) (petitions to deny must be filed within 30 days of the Public Notice accepting the applications for filing); 47 C.F.R. § 1.106(b)(1), (f) (petitions for reconsideration must be filed within 30 days of public notice of the application grant and generally only by parties that participated during the petition to deny period); 47 C.F.R. §§ 1.113(a), 1.117(a) (action taken pursuant to delegated authority may be modified or set aside only within 30 days by the bureau exercising such authority or within 40 days by the full Commission).

<sup>28</sup> See *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (upholding Commission's denial of a petition for reconsideration on the basis that the public and the Commission have an "interest in finality of licensing decisions"); see also *Springfield Television Broadcasting Corp. v. FCC*, 328 F.2d 186, 189 (D.C. Cir. 1964) (the Commission was justified in denying a challenge to a license grant where the petitioner failed to participate during the pre-grant comment period). Alternatively, the Commission could view Teledesic's Petition as a request for the Commission to revoke MSI's and DSC's licenses under Section 312 (a) of the Communications Act. 47 U.S.C. § 312 (a). Teledesic has failed to establish any of the seven grounds provided for in that section for Com-  
(continued...)

Third, the Petition is not accompanied by an affidavit or declaration of a person with personal knowledge of the alleged facts. Accordingly, it must be dismissed under Section 309(d) of the Communications Act and Section 101.43(a)(3) of the Commission's rules.<sup>29</sup> Finally, MSI's and DSC's DEMS system build-outs fully comply with Commission rules and other DEMS precedents, as reflected by the attached declarations. Particularly in light of its own failure to include any supporting factual material, Teledesic has failed to make a

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<sup>28</sup>(...continued)

mission revocation of a license, even assuming it could establish standing to seek such relief. Nor has it established any basis for the Commission to initiate a hearing required before it can revoke a license. *See infra* p. 16 n.30, its request must be denied even if viewed as a request for revocation.

<sup>29</sup> 47 U.S.C. § 309(d)(1); 47 C.F.R. § 101.43(a)(3).

*prima facie* showing to warrant an investigation of the MSI or DSC facilities.<sup>30</sup>

Thus, on procedural grounds alone, the Petition should be dismissed.<sup>31</sup>

2. The Commission Properly Authorized MSI to Construct and Operate Multiple Channels in 25 SMSAs.

In its original applications, MSI demonstrated why its capacity, demand, and economic requirements entitled it to multiple channels under applicable rules.<sup>32</sup> MSI also plainly requested a waiver of Section 21.502(b) of the applicable microwave rules -- to the extent the Commission deemed a waiver

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<sup>30</sup> See *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976) (in order to initiate a Commission hearing, a petitioner's allegations must be both "substantial and specific"); *Stone v. FCC*, 466 F.2d 316, 322, 329 (D.C. Cir. 1972) (the allegation of ultimate, conclusory facts or mere general allegations on information and behalf are not sufficient; the "plaintiffs bear a substantial burden of specificity"). In the other cases cited by Teledesic, see Petition at 24 nn. 60-62, the petitioner relied on specific, uncontested facts. Here, not only are Teledesic's alleged facts based upon mere conjecture and unrelated newspapers articles, they are directly contradicted by MSI's and DSC's supporting declarations.

<sup>31</sup> To the extent Teledesic has filed its Petition for the purpose of delaying Commission processing of MSI's pending applications and to delay the further build-out of the MSI and DSC systems, Commission attention is directed to Public Notice, FCC 96-42 entitled "Commission Taking Tough Measures Against Frivolous Pleadings" released February 9, 1996. See also *GTE Mobilnet of Terre Haute Limited Partnership*, 7 FCC Rcd 7127, 7129 n.6 (1992).

<sup>32</sup> Whereas MSI requested multiple channel waivers of Section 21.502(b), now codified as Section 101.505(b), DSC did not. Further, the fact that MSI and DSC both have DEMS licenses in certain markets is not inconsistent with Section 101.505(b) because the companies are not under common control. See Attachment 1, Declaration of Roy Mehta.

necessary -- to enable it to construct and operate common carrier DEMS systems on multiple channels.<sup>33</sup> Now, roughly two years *after* MSI's initial applications were filed and placed on public notice, Teledesic has chosen to challenge MSI's licenses for the first time.

Teledesic, however, ignores the obvious basis for the Commission's grants to MSI of multiple channel licenses -- the waiver that MSI expressly requested. Teledesic absurdly claims that the multiple channel waiver could not have been among the rules waived in connection with MSI's applications because the rule section is not specifically listed on the attachment to MSI's licenses that contains other granted waivers.<sup>34</sup> These other waivers, however, were expressly listed on the license attachment because they related to technical or construction issues the substance of which was *not* addressed on the face of the license. Obviously that is not the case regarding MSI's multiple channel waiver *since the face of each MSI license expressly provides for multiple authorized channels*.<sup>35</sup> In order to grant the waiver, therefore, the Commission needed only to include the multiple channels on the face of the license, which it did.

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<sup>33</sup> See, e.g., MSI Application Exhibit E, at 13.

<sup>34</sup> Petition at 7 n.18.

<sup>35</sup> See Attachment 4, MSI's DEMS license for the Pittsburgh SMSA.

It simply defies logic for Teledesic to suggest that the Commission unknowingly (or "improvidently") granted MSI authority to construct and operate DEMS systems utilizing multiple channels. Indeed, the very public notices accepting these applications for filing listed each of the requested channels<sup>36</sup> and each license lists the multiple channels under a single call sign. Moreover, representatives of MSI informally met with Commission staff prior to filing the applications and discussed the nature of each of the multiple channel requests and the grounds therefor.

In short, MSI successfully demonstrated to the Commission, as required by the applicable rules, that multiple channel DEMS licenses were necessary for it to provide competitive local exchange services in the larger markets. As MSI explained in its applications, technological and other limitations had severely hampered the industry's use of the DEMS band. It was in this context that the Commission expressly authorized MSI to operate on multiple channels and authorized both DSC and MSI to construct and operate their systems pursuant to other waivers of the then-applicable Part 21 rules.<sup>37</sup> The

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<sup>36</sup> See Public Notice Report No. 1080 (Released Apr. 28, 1994); Public Notice Report No. 1110 (Released Nov. 23, 1994); Public Notice Report No. 1150 (Released Aug. 30, 1995).

<sup>37</sup> See, e.g., Amendment of Section 21.106(a)(3) and 94.71(c)(3) of the Commission's Rules, *Memorandum, Opinion and Order*, 2 FCC Rcd 3164, 3164 n.8 ("DEMS has been slow to develop partially because of (continued...)")



Commission's grant of multiple DEMS channels to MSI was therefore proper and in the public interest. Hence, rescission (or revocation) of such licenses is unwarranted and denial of the 174 applications to commence the build-out of seven of these markets is also unwarranted.<sup>38</sup>

3. The Recent Administrative Freeze Does Not Apply To The Pending 174 Applications.

The Wireless Telecommunications Bureau and International Bureau recently released the *Freeze Order* freezing new applications for 18 GHz DEMS licenses and holding in abeyance approximately 70 other 18 GHz DEMS applications. Contrary to Teledesic's characterization of the *Freeze Order*, however,

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<sup>37</sup>(...continued)

the cost of DTS equipment"). The Commission similarly had granted other DEMS applicants waivers of Section 21.502. See, e.g., File No. 4624-CE-P/L-93 (Granted Jan. 9, 1995) and File No. 4620-CE-P/L-93 (Granted Jan. 12, 1995), FirstMark Communications licenses for Los Angeles and San Francisco SMSAs, respectively. Teledesic chooses to ignore the obvious evolution of the relevant marketplace over the past decade and the need for the Commission to afford DEMS and other service licensees flexibility to respond to market forces. See Petition at 12.

<sup>38</sup> Teledesic's suggestion that the Commission's rules contemplated that no DEMS licensee would ever be permitted to hold more than two channel pairs in a SMSA is incorrect. Petition at 8, 11. There is no limit on the number of times that a DEMS licensee can make a showing for additional channels. Indeed, this is consistent with the manner in which the Commission traditionally enabled SMR, paging and other operators to increase loading on their licensed systems. See 47 C.F.R. § 22.539; 47 C.F.R. § 90.658. Even if Teledesic were correct, however, such a limitation was waived on the face of each relevant MSI license.